

No. 16,135

In the

United States Court of Appeals

For the Ninth Circuit

W. D. MacKAY,

Appellant,

vs.

AMERICAN POTASH & CHEMICAL CO., INC.,
a corporation, and STAUFFER CHEMICAL
COMPANY, a corporation,

Appellees.

Appellee Stauffer Chemical Company's
Answering Brief

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FILED

APR 10 1959

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Jurisdiction	1
Statement of the case	1
Chronology	3
Summary of argument	4
Argument	5
A. Analysis of facts.....	5
B. Analysis of the authorities.....	9
C. Additional questions raised by appellant.....	11
Conclusion	12

TABLE OF AUTHORITIES CITED

	Page
Albert v. Brownell, 219 F.2d 602.....	11
Bruce Construction Corp. v. United States, 242 F.2d 873, 874....	10
Burgert v. Union Pacific Railroad Company, 240 F.2d 207, 210-211	9
Byrnes v. Mutual Life Insurance Company of New York, 217 F.2d 497, 500	9
Engl v. Aetna Life Insurance Co., 139 F.2d 469, 473.....	9
Klein v. Belle Alkali Company, 229 F.2d 658, 662.....	10
Lewis v. Clarence Coal Mining Co., 130 F. Supp. 909, 912.....	11
Lindsey v. Leavy, 149 F.2d 899, 902.....	9
SMS Manufacturing Company v. U.S. Mengel Plywoods, 219 F.2d 606, 607.....	10
Suckow Borax Mines Consolidated v. Borax Consolidated, 185 F.2d 196, 205	9
United States v. Jones, 155 F. Supp. 52, 56.....	11
Whelan v. New Mexico Western Oil and Gas Company, 226 F.2d 156	10

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JURISDICTION

The answering brief of American Potash sets forth the basis for federal jurisdiction. That statement is incorporated by reference herein.

STATEMENT OF THE CASE

This action was one alleging the making of an oral contract between appellant and American Potash and Chemical Co., hereinafter referred to as "American Potash",

and West End Chemical Company (since merged into appellee, Stauffer Chemical Company, hereinafter referred to as "Stauffer"), under which appellant was to serve the defendants in securing natural gas service to defendants' plants in the vicinity of Trona, California. Appellant alleges that the contract provided that he be compensated in a reasonable amount to be agreed on if he secured said natural gas service for the defendants (R11). Appellant further alleges that as a result of his services, defendants made a contract for such natural gas service with Pacific Gas & Electric Company on April 11, 1955 and that defendants have been receiving natural gas under that contract since October 1, 1955 (R12).

The complaint is in three counts. The first is for reasonable compensation for such alleged services in the amount of \$250,000; the second count is for declaratory relief based on the same facts; and the third count, also based on the same facts, seeks \$250,000 for the alleged services on a common count (R10-14).

Defendants obtained the removal of the action to the United States District Court for the Southern District of California (R3-10) and thereafter filed answers denying the making of any contract with appellant or the performance of any services for either of the defendants. Defendants admitted the making of contracts for the supplying of natural gas service with Pacific Gas & Electric Company but denied that appellant had any role in the obtaining of that contract or otherwise (R15-29).

Following pre-trial procedures, motions for summary judgment were filed by both defendants along with proposed findings of fact and conclusions of law and a proposed form of judgment (R70-77). The motions for summary judgment were based on the answers to be given by appellant to the written interrogatories which had been

previously served on him and the affidavits of Robert B. Coons, George C. Ellis, J. H. Gumz, W. M. Jacobs, and William F. Spalding.

Following several continuances granted at the request of appellant, defendants' motions for summary judgment were granted and this appeal has been taken.

CHRONOLOGY

A brief statement of the chronology may be helpful.

Action filed in State Court, July 10, 1957.

Removed to United States District Court, August 2, 1957.

Answer filed by American Potash, Aug. 7, 1957.

Answer filed by Stauffer, Aug. 26, 1957.

Pre-Trial conference ordered by Court for Oct. 7, 1957.

At the Oct. 7, 1957 hearing a continuance to Nov. 18, 1957 was granted at the request of appellant (R29).

At the Nov. 18, 1957 hearing a continuance to Dec. 16, 1957 was granted at the request of appellant (R30).

Motion to dismiss filed by American Potash Dec. 6, 1957.

At the Dec. 16, 1957 hearing the substitution of Gerald H. Gottlieb as attorney of record in place of W. D. MacKay in pro per was filed (R30). At the request of appellant's attorney the hearing was continued to January 13, 1958 (R38-39).

Defendants' interrogatories were served and filed December 20, 1957 (R38).

Defendants' motions for summary judgment were filed Jan. 3, 1958 and noticed for hearing on Jan. 13, 1958 (R70-73).

At the Jan. 13, 1958 hearing a continuance to Jan. 27, 1958 was granted at the request of plaintiff's counsel (R78).

On Jan. 27, 1958, Gerald H. Gottlieb withdrew as plaintiff's counsel and appellant was substituted again in pro per (R77). On plaintiff's motion the hearing was continued again to Feb. 17, 1958 on the statement of appellant that he wished to obtain other counsel (R81).

On Feb. 17, 1958, appellant filed his answers to defendants' interrogatories and again appeared in pro per and asked a further continuance to allow additional time to obtain counsel and to permit the institution of any discovery proceedings deemed necessary to oppose defendants' motions for summary judgment (R82-83). At this hearing the judge referred to the numerous prior continuances and stated that the continuance until March 17, 1958 would be granted, but that he intended to rule on that day on the pending motions (the applicable portions of the record are set forth in the answering brief of American Potash).

On March 11, 1958, appellant filed his affidavit in opposition to the defendants' motions for summary judgment (R97), and his motion to strike parts of the affidavits filed in support of such motions for summary judgment (R100-104) and his motion for further continuance of the hearing (R82-83).

At the hearing on March 17, 1958 defendants' motions for summary judgment were granted (R107-108). Findings of fact, conclusions of law and summary judgment were signed, served, and filed (R108-114).

SUMMARY OF ARGUMENT

The answers to defendants' interrogatories given by appellant, the affidavits filed for support of motions for summary judgment, and appellant's own affidavits filed in opposition to motion for summary judgment clearly show that there is no genuine issue as to an essential element of appel-

lant's claimed cause of action and that the summary judgment was properly granted.

ARGUMENT

A. Analysis of facts.

In his complaint appellant alleges employment by defendants to obtain natural gas service at their plants near Trona, California and the subsequent making of a contract between defendants and Pacific Gas & Electric Company for the supplying of such services. The issue of whether defendants or either of them ever entered into an agreement with appellant under which he sought to obtain gas service for defendants' plants is one that cannot be conclusively disposed of on a motion for summary judgment and it was not made the basis for defendants' motions. It must be noted, however, that particularly in the case of defendant Stauffer confirmation of defendant's contention that no contract of any sort existed between appellant and West End Chemical Company or its successor, Stauffer Chemical Company, is to be found in the testimony of appellant given on November 6, 1956 in Proceedings to Perpetuate Testimony taken in the Superior Court of the State of California in and for the County of Los Angeles, proceeding No. 668414, set forth in the affidavit of William F. Spalding in support of motion for summary judgment (R68-69).

Defendants' motions for summary judgment were based on the contention that the contracts to supply natural gas which were entered into by defendants and Pacific Gas & Electric Co. were not entered into as a result of appellant's services or efforts and that an essential element of his cause of action was therefore lacking.

Supporting the defendants' motions for summary judgment is the affidavit of J. H. Gumz (R39-44), since 1941 the

manager of commercial and industrial sales of Pacific Gas & Electric Company.

He states:

(1) That the duties of his position include the negotiation of contracts for supplying of natural gas services to industrial customers such as defendants;

(2) That the files of Pacific Gas & Electric Company reveal that the first inquiry as to availability of gas service for the Trona, California area was made in 1948 by R. B. Coons, vice president of American Potash in the form of a letter to N. R. Sutherland, then vice president of Pacific Gas & Electric Company.

(3) That in 1954, on the instructions from his own management, he instituted contract discussions with both American Potash and West End Chemical Company and continued these negotiations until the contracts were entered into on April 11, 1955;

(4) That all of the negotiations which resulted in these contracts were carried on with R. B. Coons on behalf of American Potash and George C. Ellis on behalf of West End;

(5) That at no time did he or, to his knowledge or belief, anyone else in the employ of Pacific Gas & Electric Company have any discussion or communication with appellant regarding the furnishing of natural gas to defendants or anyone else in the area of Trona, California, nor did appellant participate in any way in negotiating for such service.

Defendants' motions were further supported by the affidavit of George C. Ellis (R47-48), president of West End from 1943 to the date of its merger with Stauffer on October 1, 1956 and a vice president of Stauffer in charge of the West End Division since that date negating any activities on behalf of West End by appellant and by the affidavit of W. M. Jacobs (R44-46), a vice president of Southern Cali-

fornia Gas Company denying that he or to his knowledge anyone else in Southern California Gas Company discussed the furnishing of such services by Pacific Gas & Electric Company with that company.

These affidavits and the additional ones of William F. Spalding (R51-70) and Robert B. Coons (R48-51) are controverted only by the allegation of appellant's complaint that the contract (sic) with Pacific Gas & Electric Company was made as a result of appellant's services and efforts (R12) and the statement in appellant's affidavit in opposition to motion for summary judgment "That to the best of his knowledge and belief, he induced, effected, and set in motion the chain of events" that culminated in the contract between Pacific Gas & Electric Company and the defendants (R98).

Any issue thus raised, however, is eliminated by the answers given by appellant to defendants' interrogatories (R83-95). The questions asked of appellant (R31-38) were designed to disclose any claimed connection between the appellant and the obtaining of the natural gas service from Pacific Gas & Electric Company. The appellant's answers clearly demonstrate the lack of any such connection and the correctness of the summary judgment.

Let us briefly analyze what those answers show:

1. Interrogatory No. 1 (R84-85):

Appellant admits that he had not, prior to the April 11, 1955 date of the contracts with Pacific Gas & Electric Company, communicated in any way with any officer, agent, or employee of that company concerning the furnishing of such services.

2. Interrogatory No. 2 (R85-86):

Appellant similarly admits that there was no such contact with Pacific Gas & Electric Company between the date of the contracts and October 1, 1955, the date on which natural gas service was actually started.

3. Interrogatory No. 3 (R86-91):

This interrogatory asks as to appellant's knowledge of *any* person other than the officers or full time employees of either defendants or the Pacific Gas & Electric Company, who had anything to do with interesting Pacific Gas & Electric Company in furnishing gas service to either the general area around Trona or the defendants' plants. The only persons listed in response to this question are Howard L. Minister, an engineer of the 11th Naval District, San Diego, California, and Clarence L. Alliman, Director of Utilities, District Public Works Office, 11th Naval District, San Diego, California. Minister and Alliman were stated to have met with representatives of Pacific Gas & Electric Company in 1951 and 1952 inquiring as to the availability of gas to the United States Naval Ordnance Depot, China Lake, California.

4. Interrogatory No. 4 (R91-94):

This interrogatory is similar to No. 3 except that it asks as to information of appellant other than personal knowledge as to anyone having anything to do with interesting Pacific Gas & Electric Company in furnishing such service. In his answer, appellant refers only to Minister and Alliman, the 11th Naval District personnel.

5. Interrogatories No. 5 and 6 (R94-95):

The contracts with Pacific Gas & Electric Company had to be approved by the California Public Utilities Commission. The answers to these interrogatories negative the rendering of any services by appellant in connection with the hearings at which these contracts were approved.

In the light of these admissions, appellant cannot contend that there remains any issue as to whether appellant performed the service for which he claims to have been hired.

B. Analysis of the authorities.

What, then, is the law applicable to these facts?

It is well recognized that formal issues raised by the pleadings may be shown by affidavits or otherwise not to be genuine.

"In determining the matter, resort is had to extrinsic facts through affidavits, admissions and the like in order to find out if there is a real issue. This implies that such a finding will be made despite the fact that the pleadings as they stand present such issue." (Citing cases)

"This and other Courts of Appeals have had occasion to apply the principle readily. They have generally held that if the pleadings and affidavits show that there is no issue as to any fact material to the determination of the question, summary judgment should be granted." (Citing cases)

Byrnes v. Mutual Life Insurance Company of New York (CA 9th, 1954), 217 F.2d 497, 500;

Burgert v. Union Pacific Railroad Company (CA 8th, 1957), 240 F.2d 207, 210-211.

"The sufficiency of the allegations of a complaint do not determine the motion for summary judgment."

Lindsey v. Leavy (CA 9th, 1945), 149 F.2d 899, 902;

Suckow Borax Mines Consolidated v. Borax Consolidated (CA 9th, 1950), 185 F.2d 196, 205.

"* * * we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment." (Citing many cases)

Engl v. Aetna Life Insurance Co. (CA 2d, 1943), 139 F.2d 469, 473.

"The purpose of the rule is to provide against the vexation and delay which necessarily come from the formal

trial of cases in which there is no substantial issue of fact.”

SMS Manufacturing Company v. U.S. Mengel Plywoods (CA 10th, 1955), 219 F.2d 606, 607;

Whelan v. New Mexico Western Oil and Gas Company (CA 10th, 1955), 226 F.2d 156.

Discussing the use of the summary judgment, the court in *Bruce Construction Corp. v. United States* (CA 5th, 1957), 242 F.2d 873 says (p. 874) :

“Its wholesome utility is, in advance of trial, to test, not as formerly on bare contentions found in the legal jargon of pleadings, but on the intrinsic merits, whether there is in actuality a real basis for relief or defense.”

After stating that trial should be had on disputed issues, the court continues :

“But, equally vigorous in giving full range to this mechanism, we have just as consistently rejected any notions that pretense, or apparent formal controversy can thwart application of this rule or hamstring the court in determining whether it is a proper case for it. Consequently, when a movant makes out a convincing showing that genuine issues of fact are lacking, we require that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and, of course, he does not do that by mere denial or holding back evidence.”

It has even been held proper for the court to suggest on its own initiative that a motion for summary judgment be filed.

Klein v. Belle Alkali Company (CA 4th, 1956), 229 F.2d 658, 662.

Once the moving party has met his burden of showing that the formal allegations of the pleading do not raise any genuine issue, the burden shifts to the other party to make a showing of sufficient facts to justify a trial.

United States v. Jones (DC Ga., 1957), 155 F. Supp. 52, 56;

Lewis v. Clarence Coal Mining Co. (DC Pa., 1955), 130 F. Supp. 909, 912.

This burden has not been met by appellant.

On the question of the correctness of the court's decision in granting the summary judgment, appellant cites eight cases (Opening Brief, p. 5-6). In five of these cases the action of the District Court in granting summary judgment is affirmed. It is believed that there is nothing in any of the cases cited in any way inconsistent with the position of the defendants herein. One case, that of *Albert v. Brownell* (CA 9th, 1954), 219 F.2d 602, turned on the absence of a finding on an indispensable jurisdictional question. This is just the opposite of the situation in appellant's case where, on the uncontroverted record, he must fail on an essential element of his cause of action.

C. Additional questions raised by appellant.

Appellant raises two other issues in his brief (Opening Brief, p. 4). The first raises a question as to whether the District Court granted the motions for summary judgment or a motion to dismiss. The judgment and findings of fact and conclusions of law speak for themselves and eliminate any question in this regard (R108-114). There is no issue involving the statute of limitations before this court and the portion of appellant's brief dealing with this question is completely irrelevant.

The final question raised by appellant concerns the propriety of defendants' affidavits and the court's failure to grant his motion for a further continuance. These points are discussed in the Answering Brief of defendant, American Potash. We wish to adopt that portion of the Brief of American Potash and by this reference incorporate it herein.

CONCLUSION

The action of the District Court in granting the motions for summary judgment was the only action which could be justified under the circumstances present here. It was taken after every reasonable opportunity had been accorded the appellant to pursue discovery procedures or to obtain substitute legal counsel. It would be most unreasonable to burden the defendants and the Court with a time-consuming trial of "issues" no longer at issue. To thus needlessly prolong the litigation would scarcely benefit even the appellant.

Respectfully submitted,

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